

**SYMPOSIUM ON INTEREST ANALYSIS
IN CONFLICT OF LAWS:
AN INQUIRY INTO FUNDAMENTALS WITH A
SIDE GLANCE AT PRODUCTS LIABILITY**

**Resolved: "Interest Analysis is a proper, adequate,
and workable method to choose the applicable law."**

FOREWORD

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The title of the present Symposium¹ conveys the message that a conflicts system should be evaluated on a broad spectrum. Beyond meeting the minimum constitutional requirements, it should strive for justice, and do so in a manner that is as workable as is feasible in this imperfect world of the law. The imperfection is even greater in the intractable field of conflicts where ideal solutions are impossible and the objective is to impair as little as possible.

Our focal point is interest analysis, the methodology which, in all its permutations, has dominated the conflicts agenda for the last quarter century and deconstructed traditional conflicts in most states, including Ohio. The ground chosen to test interest analysis against the other approaches is products liability, where the stakes are high, the differences in the substantive law significant, and the conflicts issues challenging.

While true believers of interest analysis remain legion, important questions have been raised and persist on the validity of its premises (actuality of legislative intent, reality and determinability of state interests in the private law sphere, distinction between true and false conflicts), on the practicality and efficiency of its methodology (cumbersomeness, vagueness, manipulation), and on the wisdom of its normative preferences (parochialism, domiciliary conceptualism). At the same time, the critics are put to the test of comparative evaluation with viable alternatives since we are not operating in a vacuum. Our cures should not aggravate the disease.

I remember vividly a 1979 comparative law meeting in which Professor Edgar Bodenheimer boldly predicted that interest analysis would be dead in ten years. Hans Baade, forecasting the opposite, predicted that interest analysis would be alive and well in a grand alliance for progress. We are halfway to that deadline and sometimes I wonder whether it is possible to test these predictions without first defining the meaning of death; without deciding whether chrysalization or transfiguration or, more ominously, transmogrification means death or rebirth. Indeed, interest analysis is becoming as diverse as Marxism or Christianity. It has been subdivided into at least three major groupings. At the right we find the Orthodox, whose prophet remains

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1. The major papers in the symposium were presented in their original form at the Annual Meeting of the Section of Conflict of Laws, American Association of Law Schools, held in Washington D.C. on January 5, 1985.

Brainerd Currie. The middle is occupied by Reformists, who modify the formula but stick with the recipe. At the other end stand the Unitarians, who want to conduct policy analysis their own way and whose left wing appears reconciled to neutral conflicts rules, but differs from traditional conflicts principally in preferring personal over territorial contacts.

Another problem is that interest analysis appears to be both a constitutional and a conflicts doctrine. Some accept it in its original role of defining the maximum that a state can do constitutionally, but question whether it constitutes "good" conflicts. Namely, they draw a distinction between the permissible and the optimal. Others may buy its soundness, but fret at the pretension that it is the only doctrine that is responsive to the constitutional imperatives.

The conflicts revolution has been pregnant for too long. The conflicts misery index, which is the ratio of problems to solutions, or of verbiage to result, is now higher than ever. In the famous Prosser quip, conflicts was supposed to be a "dismal swamp, filled with quaking quagmires."² Now we are told that it has become a "well-watered plateau."³ Thus, there is no question that its stock is all wet!

We conflicts people should confess to some of our sins. We fire the "bullets of our brain"⁴ too much too often. While we are not alone in deluging a page when a word would suffice, in citing the same authorities for the same propositions again and again and again, in repeating the "jargon of the schools"⁵ and our favorite incantations in endless monotony, we surpass in redundancy most of our brethren with the exception, perhaps, of those immersed in constitutional doctrine.

This Symposium could not have been expected to exorcise all the conflicts demons. We tried, however, to concentrate on fundamentals and to talk to each other rather than past each other. The main idea was to make a contribution to the much needed sorting out process.⁶

Our symposiasts include two each of the leading proponents and opponents of interest analysis in the United States, respectively Professors Russell Weintraub and Robert Sedler and Professors Lea Brilmeyer and Friedrich Juenger. A fifth distinguished jurist from abroad, Professor Dimitris Evrigenis, presents an international perspective. A contribution by Professor Symeon Symeonides seeking to place interest analysis in a long term perspective is followed by a series of brief comments by other conflicts experts, by my Postscript as the symposiarch, and by an appendix containing the results of an investigation into the preferred conflicts solutions for products liability.

2. Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953).

3. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (Spring 1977).

4. W. SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, Act. II, Sc. iii, line 1.247.

5. M. PRIOR, *ON EXODUS* 3:14, stanza vi (1707).

6. Recent Symposia on conflict issues include *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 933 (1981); *Supreme Court Intervention in Jurisdiction and Choice of Law: From Shaffer to Allstate*, 14 U.C. D. L. REV. 837 (1981); *Conflict-of-Laws Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981); *A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 973 (1982); *Conflict of Laws (Part I)*, 34 MERCER L. REV. 469 (1983); *Conflict of Laws (Part II)*, 35 MERCER L. REV. 417 (1984).